92-1609

No. _____

Supreme Court, U.S.
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IN THE

Supreme Court of the United States

October Term, 1992

JOHN PHILLIPS ORLEBECK,

Petitioner,

v.

STATE OF FLORIDA,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE FLORIDA DISTRICT COURT OF APPEAL, FIFTH DISTRICT

BRIEF OF RESPONDENT IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED—RESTATED

1. Whether the affirmance of a conviction without a written opinion by a state appellate court in an appeal containing a *Batson* issue constitutes a "special and important reason" for this Court to exercise its discretionary jurisdiction, especially in light of the fact that it is not clear whether the State court's affirmance of Petitioner's conviction and sentence was based on a procedural bar or on the issue's lack of merit?

2. Whether the Florida courts have implemented additional substantive and procedural hurdles a defendant must overcome in order to obtain appellate review of a *Batson* claim in Florida?

TABLE OF CONTENTS

Pages

QUESTION PRESENTED i

TABLE OF CONTENTS ii

TABLE OF CITATIONS iii

OPINION BELOW 1

JURISDICTION 2

STATEMENT OF THE CASE 3

REASONS FOR DENYING THE WRIT 4

CONCLUSION 8

TABLE OF CITATIONS

Pages

Aldret v. State, 606 So. 2d 1156 (Fla. 1992) 6

Ansin v. Thurston, 101 So. 2d 808 (Fla. 1958) 4

Batson v. Kentucky, 76 U.S. 79, 106 S. Ct. 1712, 90 L. Ed. 2d 69 (1986) 1, 3, 4, 5, 6, 7

Chrysler Corp. v. Wolmer, 499 So. 2d 823 (Fla. 1986) . . 3

Department of Legal Affairs v. District Court of Appeal, Fifth District, 434 So. 2d 310, (Fla. 1983) 5

Jefferson v. State, 595 So. 2d 38 (Fla. 1992) 6

Jenkins v. State, 385 So. 2d 1356 (Fla. 1980) 4

Joiner v. State, 593 So. 2d 554 (Fla. 5th DCA 1992) . . 6

Joiner v. State, 18 Fla. L. Weekly S280 (Fla. filed May 13, 1993) 6

Kibler v. State, 546 S. 2d 710 (Fla. 1989) 7

Orlebeck v. State, 611 So. 2d 534 (Fla. 5th DCA 1993) . 1

State v. Neil, 457 So. 2d 481 (Fla. 1984) 5

State v. Slappy, 522 So. 2d 18 (Fla., *cert. denied,* 487 U.S. 1219, 108 S. Ct. 2873, 101 L. Ed. 2d 909 (1988) 5

OTHER AUTHORITIES:

U.S.Sup.Ct. Rule 10.1(b) and (c), ... 2, 4

U.S.Sup.Ct. Rule 15.1 3

28 U.S.C. 1257(a) 2, 4

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Respondent, the State of Florida, respectfully prays this Court decline to issue a writ of certiorari to review the decision of the Florida District Court of Appeal, Fifth District, in this cause.

OPINION BELOW

The decision of the Florida Fifth District Court of Appeal is reported as *Orlebeck v. State,* 611 So. 2d 534 (Fla. 5th DCA 1993).

JURISDICTION

Petitioner purports to invoke this Court's jurisdiction under 28 U.S.C. Section 1257(a). However, the per curiam affirmance of Petitioner's conviction and sentence without opinion by the Fifth District Court of Appeal of the State of Florida does not draw into question the validity of any United States treaty or statute, the constitutionality of any Florida state statute or any title, right, privilege or immunity specially set up or claimed under them.

Likewise, under U.S. Sup. Ct. Rule 10.1(b) and (c), the per curiam affirmance by the Fifth District Court of Appeal of the State of Florida in this case did not decide any federal question in a way that conflicts with applicable decisions of this Court or another state court of last resort or of a United States Court of Appeals.

In light of the foregoing, Respondent would suggest that this Court should decline to exercise its discretionary jurisdiction over this case.

STATEMENT OF THE CASE

Pursuant to U. S. Sup. Ct. Rule 15.1, Respondent accepts Petitioner's Statement of the Case except for the following "perceived misstatements of fact or law":

(1) The most significant omission from Petitioner's "Statement of the Case" is the fact that, after defense counsel's objection to the prosecutor's use of peremptory challenges to excuse two minority members of the venire, the prosecutor did give valid, race-neutral reasons for excusing the two African-American prospective jurors in question.

On appeal, in response to Petitioner's *Batson v. Kentucky,* 476 U.S. 79, 106 S.Ct. 1712, 90 L.Ed.2d 69 (1986) claim, Respondent argued, not only that the claim was procedurally barred because of defense counsel's failure to preserve the issue by appropriate motion, but also that the prosecutor had given sufficient, valid race-neutral reasons for striking the two African-American members of the venire, Ms. Harris and Mr. Worrell. The trial court did not refuse to inquire into the reasons for the prosecutor's use of his peremptory challenges as Petitioner suggests. The prosecutor stated on the record that he struck Ms. Harris because she had a son who was in prison. He stated that Mr. Worrell was challenged because he had been noncommittal when asked about the legalization of marijuana. (R.9).

(2) Petitioner contends that the prosecutor used his peremptory challenges to exclude two prospective African-American jurors and one Hispanic juror. While it is true that the two African-Americans were excused by the State, the Hispanic juror, Juror Number 1, Ms. Gonzalez, was excused by the defense. (R.4,7).

(3) Under Florida law, the District Courts of Appeal are not "intermediate appellate courts" as Petitioner suggests. *See Chrysler Corp. v. Wolmer,* 499 So. 2d 823, 828 (Fla. 1986),

citing *Jenkins v. State,* 385 So. 2d 1356, 1357 (Fla. 1980) and *Ansin v. Thurston,* 101 So. 2d 808, 810 (Fla. 1958).

(4) Petitioner's comments about what questions were asked during oral argument in the Fifth District Court of Appeal of the State of Florida are not matters of record and there is no way of knowing whether the District Court's affirmance on the *Batson* issue was based upon procedural bar or upon the issues total lack of merit.

REASONS FOR DENYING THE WRIT

I. REVIEW ON CERTIORARI IS NOT A MATTER OF RIGHT, BUT OF JUDICIAL DISCRETION. THERE IS NO CONFLICT BETWEEN THIS COURT'S DECISION IN *BATSON V. KENTUCKY* AND THE AFFIRMANCE WITHOUT OPINION OF PETITIONER'S CONVICTION AND SENTENCE BY THE STATE DISTRICT COURT OF APPEAL IN THE CASE SUB JUDICE.

As previously noted in the State of Florida's jurisdictional statement, Petitioner seeks to invoke this Court's jurisdiction under 28 U.S.C. Section 1257(a). However, the per curiam affirmance of Petitioner's conviction and sentence without opinion by the Fifth District Court of Appeal of the State of Florida does not draw into question the validity of any United States treaty or statute, the constitutionality of any Florida state statute or any title, right, privilege or immunity specially set up or claimed under them. Likewise, under U.S. Sup. Ct. Rule 10.1(b) and (c), the Fifth District Court's per curiam affirmance did not decide any federal question in a way that conflicts with applicable decisions of this Court or another state court of last resort or of a United

States Court of Appeals. In Florida, a per curiam appellate decision with no written opinion has no precedential value. *Department of Legal Affairs v. District Court of Appeal, Fifth District,* 434 So. 2d 310, 311 (Fla. 1983).

In light of this fact, Petitioner has failed to establish "any special or important reasons" for this Court to exercise its discretionary jurisdiction and to grant the Petition for Writ of Certiorari. The Florida District Court's per curiam affirmance without opinion of Petitioner's conviction for possession of approximately two ounces of marijuana and his probationary sentence imposed thereon presents no substantial federal question.

II. THE FLORIDA COURTS HAVE NOT ADDED ANY ADDITIONAL SUBSTANTIVE AND PROCEDURAL HURDLES TO OBTAINING APPELLATE REVIEW OF A CLAIM PURSUANT TO THIS COURT'S DECISION IN *BATSON V. KENTUCKY,* 476 U.S. 79, 106 S. CT. 1712, 90 L. ED. 2D 69 (1986).

Petitioner contends that the District Court's decision was based upon a procedural bar and that the merits of his claim were never considered. That is pure conjecture on his part. While it is true that defense counsel waited until after the jury had been selected to make his *Batson* objection and made no motion to strike the panel or motion for mistrial, it is not clear that the District Court's per curiam affirmance was not based on the fact that the prosecutor had given valid, race-neutral reasons for excusing the two African-American prospective jurors in question. *See State v. Slappy,* 522 So. 2d 18 (Fla.), cert. denied 487 U.S. 1219, 108 S.Ct. 2873, 101 L. Ed. 2d 909 (1988) and *State v. Neil,* 457 So. 2d 481 (Fla. 1984).

The State peremptorily challenged prospective juror number seven, Ms. Harris, and prospective juror number nine, Mr. Worrell. After the entire jury panel was selected, defense counsel announced his objection to the State's challenges to these two African-American members of the venire. Despite the fact that these objections were not timely made, the prosecutor volunteered that he struck Ms. Harris because she had a son in prison and that he would never put someone in that position on a jury. He said that Mr. Worrell had been noncommital when asked about his views on the legalization of marijuana. A juror's opinion on that issue could be crucial in a marijuana possession prosecution like the instant case. Both of these reasons for the State's use of its peremptory challenges were perfectly valid and reasonable and had nothing whatsoever to do with Mr. Worrell's or Ms. Harris' racial background.

As for Petitioner's contention that the District Court's decision in *Joiner v. State,* 593 So. 2d 554 (Fla. 5th DCA 1992), has "...added substantive and procedural burdens to this Court's decision in *Batson,* which a defendant in Central Florida trial courts must now satisfy in order to obtain appellate review in Florida", the Florida Supreme Court has since reviewed that decision and specifically disapproved the District Court's suggestion that the preferred procedure for preserving this issue is to move to strike the jury panel. *Joiner v. State,* 18 Fla. L. Weekly S280 (Fla. filed May 13, 1993). (Appendix A-1).

In *Jefferson v. State,* 595 So. 2d 38, 41 (Fla. 1992) and in *Aldret v. State,* 606 So. 2d 1156 (Fla. 1992), the Florida Supreme Court held that, when there has been an improper use of a peremptory challenge, it is not necessary that the entire jury pool be stricken. The trial court may simply use its discretion to seat the improperly challenged juror. In the instant case, defense counsel should have voiced his objection to the prosecutor's allegedly improper use of his

peremptory challenges at the time they were exercised rather than waiting until the jury had been selected and then deciding he would prefer another panel. Petitioner has failed to demonstrate that the District Court's per curiam affirmance of his conviction and sentence has, in any way, "added substantive and procedural burdens to this Court's decision in *Batson*."

Parenthetically, the State of Florida has held that a white defendant, like Petitioner, has standing to object to the prosecutor's use of peremptory challenges to exclude members of cognizable racial groups even though the defendant is not a member of any of those groups. *Kibler v. State*, 546 So. 2d 710, 712 (Fla. 1989). However, the fact that a defendant is of a different race from the challenged jurors may be relevant to the issue of whether the challenges were made for reasons related to race, i.e., where the defendant and victim are of different racial backgrounds.

However, in a case such as this one, where the defendant is a white male charged with the "victimless" crime of possession of marijuana, and where the prosecutor gave valid, race-neutral reasons for his peremptory challenges, there is no reason to suspect any hidden, racially-related motivation.

CONCLUSION

For the foregoing reasons, Respondent respectfully requests this Court deny the Petition for Writ of Certiorari.

Respectfully submitted,

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No. _____

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APPENDIX TO BRIEF OF RESPONDENT TO THE PETITION FOR WRIT OF CERTIORARI

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INDEX TO APPENDIX

Document: *Page*

Eddie Joiner v. State of Florida, 18 Fla. L. Weekly S280 (Fla. filed May 13, 1993) A-1

EDDIE JOINER, etc., Petitioner, vs. STATE OF FLORIDA, Respondent. Supreme Court of Florida, Case No. 79,657, May 13, 1993. Application for Review of the Decision of the District Court of Appeal — Direct Conflict Decisions, Fifth District — Case No. 91-99 (Orange County), James B. Gibson, Public Defender; and Kenneth Witts and Sophia B. Ehringer, Assistant Public Defenders, Seventh Judicial Circuit, Daytona Beach, Florida, for Petitioner. Robert A. Butterworth, Attorney General; and David G. Mersch and Nancy Ryan, Assistant Attorneys General, Daytona Beach, Florida, for Respondent.

(SHAW, J.) We review *Joiner v. State,* 593 So. 2d 554 (Fla. 5th DCA 1991), based on conflict with *Kibler v. State,* 546 So. 2d 710 (Fla. 1989), and *Jefferson v. State,* 595 So. 2d 38 (Fla. 1992)[1] We have jurisdiction. Art. V, § 3(b)(3), Fla. Const.

The Fifth District Court of Appeal affirmed the convictions of Eddie Joiner (Joiner) for possession of a controlled substance and resisting arrest without violence. Joiner contends that *State v. Neil,* 457 So. 2d 481 (Fla. 1984), *clarified,*

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1 Conflict was also alleged with *Adams v. State,* 559 So. 2d 1293 (Fla. 3d DCA, *dismissed,* 564 So. 2d 488 (Fla. 1990, and *Charles v. State,* 565 So. 2d 871 (Fla. 4th DCA 1990). These cases are distinguishable and therefore are not in conflict. The district court in *Adams* held that the *State v. Neil,* 457 So. 2d 481 (Fla. 1984) *clarified, State v. Castillo,* 486 So. 2d 565 (Fla. 1986), issue was properly preserved for appellate review when defense counsel pointed out that the juror struck by the State was African-American, asserted that the State could not give a reasonable explanation for challenging the juror and was denied the inquiry required by *Neil.* The question whether objection to the final panel was additionally required was neither presented nor determined. The *Charles* court held that the *Neil* error was properly preserved because a codefendant's lawyer had preserved it and the objection of a codefendant's lawyer, by agreement with the judge, was an objection for Charles as well.

State v. Castillo, 486 So. 2d 565 (Fla. 1986), was violated when the State gave an inadequate reason for a peremptory challenge of an African-American juror. The district court held that Joiner failed to preserve his objection to the composition of the jury.

During jury selection the State peremptorily challenged Mrs. Gamble, an African-American. After the State had excused her, defense counsel asked the court to inquire as to the reasons and the court did so. The State replied: "I would like to constitute the jury with some people down the line I prefer more, and including another juror." *Joiner,* 593 So. 2d at 555-56. The judge erroneously ruled that the reason given for the strike satisfied the *Neil* inquiry in that it was racially neutral. There is no doubt that the State gave an inadequate reason for exercising a peremptory challenge against Mrs. Gamble. We held in *Kibler* that the reasons "I preferred other jurors" and "I liked [other jurors] better" were insufficient to rebut the defendant's assertion that the exercise of a peremptory challenge was racially motivated. Joiner's counsel ruling, voir dire continued, the jury was accepted by both parties, and Joiner was found guilty. In concluding that Joiner had failed to preserve the *Neil* issue, the district court reasoned:

> We believe that a party must do more than request a *Neil* inquiry and voice disagreement with an opponent's explanation. If a party is dissatisfied with a jury panel after hearing an explanation elicited through a *Neil* inquiry, some remedy should be requested of the trial court. For example, the defense in the instant case should have moved to strike the jury panel at some time during the jury selection process, but before the jury was sworn, at the latest. The defense did not do this; on the contrary, at the end of the jury selection, the defense stated that the jury was acceptable. Further, no mention of the jury selection was in the motions for acquittal during

> the trial, and it was only after receiving the adverse verdict and judgment that the issue was again raised in a motion for acquittal or new trial.

Joiner, 593 So. 2d at 556 (citation omitted).

We held in *Jefferson* that striking the entire jury panel is not the only remedy for a *Neil* violation. There we held that seating the improperly challenged juror is a proper remedy for a *Neil* violation. We agree with Joiner that a new panel may exacerbate rather than alleviate the constitutional violation *Neil* is designed to remedy. We therefore disapprove the lower court's suggestion that the preferred procedure for reserving the issue is to move to strike the jury panel. We also disagree with Joiner that a motion for judgment of acquittal is designed to test the sufficiency of the evidence against a defendant and is therefore an inappropriate vehicle for a *Neil* objection. *Anderson v. State,* 504 So. 2d 1270 (Fla. 1st DCA 1986).

We do not agree with Joiner, however, that he preserved the *Neil* issue for review. He affirmatively accepted the jury immediately prior to its being sworn without reservation of his earlier-made objection. We agree with the district court that counsel's action in accepting the jury led to a reasonable assumption that he had abandoned, for whatever reason, his earlier objection. It is reasonable to conclude that events occurring subsequent to his objection caused him to be satisfied with the jury about to be sworn. We therefore approve the district court to the extent that the court held that Joiner waived his *Neil* objection when he accepted the jury.[2] Had Joiner renewed his objection or accepted the jury subject to his earlier *Neil* objection, we would rule otherwise. Such action would have apprised the trial judge that

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2 Were we to hold otherwise, Joiner could proceed to trial before a jury he unqualifiedly accepted, knowing that in the event of an unfavorable verdict, he would hold a trump card entitling him to a new trial.

Joiner still believed reversible error had occurred. At that point the trial judge could have exercised discretion to either recall the challenged juror for service on the panel, strike the entire panel and begin anew, or stand by the earlier ruling.

We take this opportunity to clarify a misapprehension on the part of the State. The State argues that because the juror who replaced Mrs. Gamble was also an African-American, any *Neil* violation was cured. This argument misconstrues our holding in *Taylor v. State,* 583 So 2d 323 (Fla. 1991). *Taylor* held that a substantial likelihood that the State was exercising its peremptory challenges in a discriminatory way had not been shown and therefore the trial court had not erred in refusing to require the State to provide its reasons. We decline the State's invitation to rule that as along as an improperly challenged juror is replaced by a member of the same minority the constitutional infirmity is cured. Jurors are not fungible. Each juror has a constitutional right to serve free of discrimination. The striking of a single African-American juror for racial reasons violates the Equal Protection Clause. *State v. Slappy,* 522 So. 2d 18, 21 (Fla.), *cert. denied,* 487 U.S. 1219, 108 S. Ct. 2873, 101 L. Ed. 2d 909 (1988). Were we to endorse the State's view we would retain no practical device for redressing each person's right to serve on a jury free of being stricken for racially discriminatory reasons.

Accordingly, we approve the result in the district court below, although not the reasoning.

It is so ordered. (BARKETT,C.J., and McDONALD, GRIMES, KOGAN and HARDING, J. J., concur. OVERTON, J., concurs in result only.)